

FCC MAIL SECTION

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Before the
Federal Communications Commission
Washington, D.C. 20554

OCT 1 40 PM '04

In the Matter of)	DISPATCHED
)	
Amendment of Section 73.202(b),)	
FM Table of Allotments,)	
FM Broadcast Stations.)	
(Banks, Redmond, Sunriver and Corvallis)	MM Docket No. 96-7
Oregon))	RM-8732
)	RM-8845
In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-12
FM Table of Allotments,)	RM-8741
FM Broadcast Stations.)	
(The Dalles and Corvallis, Oregon))	
)	
In re Application of)	
)	
Madgekal Broadcasting, Inc.)	File No. BPH-960206IE
Station KFLY(FM), Corvallis, Oregon)	
)	
For Construction Permit to Modify Licensed)	
Facilities (One-Step Upgrade))	

ORDER

Adopted: September 29, 2004

Released: October 1, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Joint Request for Approval of Settlement Agreement filed by Madgekal Broadcasting, Inc. ("MBI"), Citicasters Licenses, L.P. ("Citicasters"), former and current licensee, respectively, of Station KFLY (FM), Corvallis, Oregon, and Infinity Radio License, Inc. ("Infinity"), licensee of Station KVMX-FM, Banks, Oregon (collectively, "Joint Petitioners"). Joint Petitioners request approval of their 2004 Settlement Agreement between MBI, Citicasters and Infinity, and they also request that the Commission grant the pending license application to implement the upgrade of Station KVMX from Class C2 to Class C1.¹

Background

2. This case originated as two separate rulemaking proceedings. In the first proceeding, MM Docket 96-7, the staff issued a *Notice of Proposed Rule Making and Order to Show Cause* for

¹ See File No. BLH-19990305KD.

Banks and Redmond, Oregon.² The staff released *Banks NPRM* on February 6, 1996, in response to a rulemaking petition filed by Common Ground Broadcasting, proposing to upgrade Station KVMX(FM) (formerly KBBT-FM), Channel 298C2, Banks, Oregon. Specifically, *Banks NPRM* proposed to upgrade Station KVMX(FM) from Channel 298C2 to Channel 298C1 and modify its license for accordingly. To accommodate the Banks upgrade, *Banks NPRM* also proposed to substitute Channel 269C2 for Channel 298C2 at Redmond, Oregon, and modify the license for Station KLRR, Redmond, Oregon, to specify the substitute channel.³ In the second proceeding, MM Docket 96-12, the staff released a *Notice of Proposed Rule Making* for The Dalles, Oregon⁴ on February 13, 1996, in response to a rulemaking petition filed on November 20, 1995 by LifeTalk. LifeTalk's rulemaking petition proposed to allot Channel *256C3 at The Dalles, Oregon, with a 22.3 kilometer site restriction and reserve it for noncommercial educational use. However, *The Dalles NPRM* proposed that a different channel, Channel *268C3, be allotted and reserved for noncommercial educational use at The Dalles to avoid a potential city-grade signal coverage problem that could result from using Channel *256C3.

3. These two unrelated rulemaking proceedings became technically related when MBI filed its application on February 6, 1996, proposing a one-step upgrade for Station KFLY(FM), Corvallis, Oregon. This application proposed the substitution of Channel 268C for Channel 268C2 at Corvallis and the modification of the license for Station KFLY(FM) accordingly. Since the use of Channel 268C at Corvallis is short-spaced and mutually exclusive to both Channels 269C2 at Redmond, proposed in *Banks NPRM*, and to Channel *268C3 at The Dalles, proposed in *The Dalles NPRM*, the staff issued a *Public Notice*,⁵ treating the Corvallis application as a counterproposal in both MM Dockets 96-7 and 96-12, and the dockets were consolidated for consideration.

4. While the case was pending, the licensees at Banks and Corvallis submitted a joint settlement agreement ("1997 Settlement Agreement") in which the Banks, Redmond, and The Dalles proposals would be granted, with a slight change of site at The Dalles. The settlement also provided that MBI be paid \$950,000 for agreeing to modify its application to specify Channel 268C1 at Corvallis rather than Channel 268C. The parties proposed to allot Channel *268C3 at The Dalles at a location near the site proposed in the *Dalles NPRM*.

5. In *Consolidated R&O*, the Mass Media Bureau denied the settlement.⁶ The Bureau held that the settlement violated Section 1.420(j) of the rules because MBI would receive payment in excess of its legitimate and prudent expenses incurred in preparing and prosecuting its application. The Bureau rejected Petitioners' argument that Section 309 of the Communications Act of 1934, as amended, required the approval of the settlement.⁷ The Bureau then did a comparative analysis and held that the

² *Banks and Redmond, Oregon*, 11 FCC Rcd 1686 (MMB 1996) ("*Banks NPRM*").

³ The licensee of Station KLRR(FM) is Combined Communications, Inc.

⁴ *The Dalles, Oregon*, 11 FCC Rcd 1788 (MMB 1996) ("*The Dalles NPRM*").

⁵ *Public Notice* was given on June 5, 1996, Report No. 2135.

⁶ *Banks, Redmond, Sunriver, Corvallis, et al., Oregon*, 13 FCC Rcd 6596 (MMB 1998) ("*Consolidated R&O*").

⁷ 47 U.S.C. § 309(l)(3) directed the Commission to waive any rules necessary to permit agreements to remove conflicts between certain applications. The Bureau held that this section does not apply to petitions for rulemaking to amend the FM Table of Allotments. See also *MO&O*, *supra*, n. 1.

public interest was better served by the combination of the upgrade at Banks and the Channel 268C3 allotment to The Dalles, as the community's first local noncommercial educational service, rather than the upgrade at Corvallis alone, which would only have expanded service by an existing voice.⁸ It thus granted the upgrade of Station KVMX(FM), Banks, Oregon, from Channel 298C2 to Channel 298C1, and the related substitution of Channel 269C2 for Channel 298C2 at Redmond, in combination with the allotment of Channel *268C3 at The Dalles, although the latter allotment was made at a different reference site than the one proposed in *The Dalles NPRM*. The *Consolidated R&O* also denied the one-step upgrade application for Station KFLY at Corvallis from Channel 268C2 to Channel 268C. A non-conflicting allotment, Channel 224C2 at Sunriver, Oregon also was granted.⁹

6. On May 27, 2004, the Commission released a *Memorandum Opinion and Order*, FCC 04-118 in which we upheld the denial of the 1997 Settlement Agreement, the grant of the Station KVMX proposal, the grant of the LifeTalk proposal and the denial of the Station KFLY proposal.

7. On June 28, 2004, MBI and Citicasters each filed a Petition for Review with the United States Court of Appeals for the DC Circuit. These cases have been consolidated and Infinity has been granted a motion to intervene. The Court is holding the case in abeyance pending our review of the 2004 Settlement Agreement.¹⁰

8. We find that the 2004 Settlement Agreement complies with our rules. The 2004 Settlement Agreement provides that in return for the dismissal of the cases pending before the Court of Appeals, and the filing of the joint request before the Commission, Infinity has agreed to reimburse MBI and Citicasters, each, their reasonable and prudent expenses incurred in this proceeding up to a maximum of \$58,000 for MBI and \$12,000 for Citicasters.

9. To demonstrate compliance with Section 1.420(j) of the Commission's rules, MBI includes the declaration of its President, Mario Pastega, verifying that the only consideration MBI will receive is a maximum of \$58,000, as specified in the 2004 Settlement Agreement, and that this is the only consideration that MBI will receive. He also states that MBI did not file its application for the purpose of reaching or carrying out a settlement, and that approval of this settlement is in the public interest because it will conserve resources of the parties and the Commission and will speed final resolution of this proceeding. MBI also includes a declaration from its attorney, Matthew McCormack, to show that the fees, including finance charges, and expenses MBI incurred with his firm, Reddy, Begley and McCormick, LLP, amounted to a total of \$53,688.91. Mr. McCormack's declaration also listed the services performed by his firm to substantiate the fees. Finally, MBI includes the declaration of its consulting engineer, Robert McClanathan, which shows that the fees and expenses it incurred with his firm, McClanathan and Associates, Inc., amounted to \$11,508 in these proceedings. Mr. McClanathan's declaration also lists the services performed by his firm to substantiate the fees incurred. MBI states that the fees and expenses exceed the settlement amount and thus establish that the settlement amount is within the legitimate and prudent expenses it incurred in this proceeding.

⁸ See *Banks, Redmond, Sunriver, Corvallis, et al., Oregon*, 13 FCC Rcd at 6604-05.

⁹ *Id.*

¹⁰ *Madgekal Broadcasting, Inc., v. FCC*, Case No. 04-1202; *Citicasters Licenses, L.P. v. FCC*, Case No. 04-1204 (consolidated by Order filed June 30, 2004). On July 29, 2004, the Court granted a motion Infinity filed to intervene. On the same day, the Court granted the parties "Joint Motion to Hold in Abeyance and for Remand of Record" to defer various filing deadline pending Commission review of the 2004 Settlement Agreement.

10. To show that its participation in the settlement complies with Section 1.420(j) of the Commission's rules, Citicasters submits the declaration of Jeff Littlejohn, its Senior Vice-President, Engineering, to show that 2004 Settlement Agreement constitutes the entire understanding between Citicasters and all other parties to the proceeding. Mr. Littlejohn further states that the only consideration that Citicasters will receive is the amount, of \$12,000, as specified in the 2004 Agreement, which will reimburse Citicasters for its expenses in connection with the KFLY construction permit incurred with Hogan and Hartson, LLP, as set forth in the declaration of attorney Marissa Repp. Mr. Littlejohn also states that Citicasters did not prosecute the KFLY construction permit application for the purpose of reaching or carrying out a settlement. Finally, Mr. Littlejohn states that that approval of that Agreement is in the public interest and that it will conserve the resources of the parties and the Commission and will speed final resolution of this proceeding. Citicasters also submits the declaration of its Ms. Repp, a partner with Hogan and Hartson, LLP, whose firm represented both Citicasters and Jacor Licensee of Louisville, Inc. ("Jacor"), Station KFLY's previous licensee, in this proceeding. Ms. Repp's declaration verifies that Jacor and Citicasters incurred in excess of \$12,000 in legal fees with her firm, and lists the services the firm performed to substantiate the fees charged.

11. Finally, in further support of the 2004 Settlement Agreement, Infinity submits the declaration of Stephen Hildebrandt, Vice President, to verify that, except as set forth in the 2004 Settlement Agreement (and the 1997 Settlement Agreement as defined by the 2004 Settlement Agreement, which will be terminated after approval of the 2004 Settlement Agreement), neither Infinity, nor any Infinity principal has paid or promised to pay any consideration to MBI, Citicasters or their principals in connection with the matters relating to the 2004 Settlement Agreement. He further states that approval of the 2004 Settlement Agreement is in the public interest for the same reasons expressed by MBI and Citicasters.

12. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. §1.420(j) the 2004 Settlement Agreement by Madgekal Broadcasting, Inc., Citicasters Licenses, L.P., and Infinity Radio License, Inc., IS GRANTED.

13. IT IS FURTHER ORDERED That File No. BLH-19990305KD IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau